Supreme Court, U. S.
FILED
AUG 4 1980
MICHAEL RODAK, JR., CLERK

80-166

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

JOHN COLBY, *Pro Se*,

Petitioner,

—against—

SECRETARY OF HEALTH, EDUCATION AND WELFARE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN COLBY, *Pro Se*
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QUESTIONS FOR THE COURT

Why did the Court of Appeals for the 2nd Circuit ignore the five cases[1] (including three Appellate Court decisions) I presented to support my case and use Thompson v. Weinberger 395 F Supp 1102 E.D. Va. (1976) Rev'd 548 F 2d 1122, 4th Circuit 1976), which has no relevance to my case, as the basis for denying my appeal?

Why did the Court of Appeals for the 2nd Circuit accept the twisted interpretation by the Social Security Administration's ("SSA") lawyer of Angell v Flemming 291 F 2d 72 (4th Circuit 1961) and disregard the correct version which I read to the Court in oral argument?

1: Angell v Flemming 291 F. 2d 72 (4th Cir 1961)
Butler v Flemming 288 F. 2d 591 (5th Cir 1961)
Harper v Flemming 288 F. 2d 61 64 (4th Cir 1961)
Joyner v Ribicoff 206 F. Supp. (W.D. Va., 1962)
Miller v Ribicoff 195 F. Supp (W.D. S.C. 1961)

Why did the Court of Appeals for the 2nd Circuit state, in its decision, that Angell, supra supports the "SSA" when the case, except for the dollar amount is identical to mine?[2]

2: While the employer in Angell, supra, knew that $40 of the pay check was for business expenses, he did not specify it on the pay check and paid FICA taxes on the full $60. Likewise, my employer knew that a large part of my commissions was for business expense but paid FICA taxes on the full taxable amount as required by law. (Photocopy of my employer's letter to the Internal Revenue Service supporting this was submitted to the Court of Appeals for the 2nd Circuit in the Appendix to my Brief.)

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SECRETARY OF HEALTH, EDUCATION and WELFARE,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPENING STATEMENT

Petitioner, John Colby, prayerfully requests permission to appeal the decision of the United States Court of Appeals for the Second Circuit.

I respectfully request that this Court hear my case because of the conflict in decisional

law of the various Courts of Appeals as follows:

The decision of the Court of Appeals for the 2nd Circuit is that the expenses of a salesman on a commission basis are not deductible when stating net income for Social Security purposes.

This opinion is opposed by the Court of Appeals for the 4th Circuit in Angell v. Flemming, 291 F. 2d 72 4th Cir. (1961) and Harper v. Flemming, 288 F. 2d 61 64, 4th Cir. (1961), and the Court of Appeals for the 5th Circuit in Butler v. Flemming, 288 F. 2d 591 5th Cir. (1961). Both Courts, in the above cases, have ruled that a salesman, on commission basis, may deduct expenses necessary for the proper performance of his work when reporting net income to the Social Security Administration (SSA).

It is respectfully submitted that this Court should hear my case in order for the law on this very important issue be resolved by the Court.

STATEMENT OF THE CASE

The Court of Appeals for the 2nd District

has cited Thompson v. Weinberger 395 F. Supp 1102 E.D. Va. (1975), Rev'd 548 F. 2d 1122 4th Cir. (1976), and Angell v. Flemming, supra, as authority to deny this petitioner relief from the District Court decision.

The Thompson case, supra, has extremely little bearing on this case. Thompson, a City Councilman of Richmond, deducted expenses for an office and a secretary which were not required and for which he could have been reimbursed by the City of Richmond according to the City Charter.

In Angell, supra, the Social Security Administration's attorney distorted the case in his brief and the Court of Appeals for the 2nd District accepted it, almost verbatim, even though I read to the Court, in oral argument, the pertinent part of the 4th Circuit Court decision. The 4th Circuit Court held:

> "Since it is indisputable that Angell must have had some travelling expenses to cover the territory, and as it is clear that both he and his employer considered $40 of the weekly check to be for business expenses, there

is no rational basis for treating the entire $60 per week as income." 291 F. 2nd at 75.

NOTE: The employer in Angell, supra, paid FICA taxes on the full $60.

In contrast, the 4th Circuit Court upheld the right of travelling salesmen to deduct business expenses. The 2nd Circuit Court accepted the distorted version of the SSA attorney.

The criteria applied to Angell, supra, by the 4th Circuit Court was:

1: Is the expense required to properly perform the work for which the salesman was hired?

2: Was the expense included in the weekly pay check without being identified as to which part was wages and which part was expenses?

The answer for Angell, supra, and the case at bar is "yes" to both questions. This criteria also applies to Harper v. Flemming, supra, and Butler v. Flemming, supra.

The Social Security Act contains no prohibition regarding the deduction of business expense

by commission salesmen when reporting net income to the SSA. In this regard, Judge Sobeloff of the 4th Circuit Court, in Harper v. Flemming, supra, stated:

> "There is no warrant for reading into the statute fine-spun limitations of which the legislative authority has given no intimation."

In Butler v. Flemming, supra, the 5th Circuit Court was more specific:

> "The requirement of specific designation would work an undue hardship on the plaintiff in this case. Identification of sums paid to him by his employer was outside plaintiff's control. It would be unreasonable and unfair to hold plaintiff responsible for the failure of [his] company to comply with the Regulation. The purpose of the section of the Act under which deductions are imposed against benefits is to insure that individuals who are otherwise entitled will not receive Social Security benefits when their actual earnings exceed the prescribed maximum. It is not the purpose of this section to defeat the benefits to which an individual is entitled when that individual in fact earned less than the prescribed maximum.

> I must, therefore, conclude that the commissions paid to plaintiff by [his company] . . . were commissions which included unspecified sums paid to plaintiff as reimbursement for travelling and other necessary expenses of employment, and were not "wages" within the meaning of Section 203 of the Social Security Act. 195 F. Supp. at 535."

CONCLUSION

For the foregoing reasons, I respectfully request that the Court grant the Writ of Certiorari petition.

Respectfully submitted,

JOHN COLBY, Pro Se.
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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

JOHN COLBY,

Plaintiff,

79 Civil
1194 (RLC)

-against-

JUDGMENT

SECRETARY OF HEALTH, EDUCATION
and WELFARE,

Defendant.

----------x

Plaintiff having moved the Court for summary judgment, pursuant to Rule 56, and defendant having moved for judgment on the pleadings, pursuant to Rule 12(c), of the Federal Rules of Civil Procedure, and the said motions having come on before the Honorable Robert L. Carter, United States District Judge, and the Court thereafter on January 18, 1980, having handed down its opinion, constituting its findings of fact and conclusions of law, denying plaintiff's summary judgment motion and granting defendant's motion, it is,

ORDERED, ADJUDGED and DECREED: That the complaint be and it is hereby dismissed.

Dated: New York, N. Y.
January 24, 1980

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

JOHN COLBY,

Plaintiff, 79 Civ.1194 (RLC)

-against-

SECRETARY OF HEALTH, EDUCATION and WELFARE,

Defendant.
----------x

APPEARANCES

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Attorney for Defendant
By: ROBERT M. JUPITER
Assistant United States
Attorney of Counsel

CARTER, District Judge

OPINION

John Colby brought this action under section 205(g) of the Social Security Act, as amended (the "Act"), 42 U.S.C. §405(g), to review a final determination of the Secretary of Health, Education and Welfare ("Secretary") that Colby was overpaid $8,982.10 in retirement insurance benefits for the years 1974 through 1976 and that recovery thereof may not be waived. The parties agree that no material questions of fact are in dispute, and that the case is appropriate for a decision on the basis of the administrative record. Colby has moved for summary judgment, and the Secretary for judgment on the pleadings.

Facts

Colby was born in 1907 and became eligible for Social Security benefits in April, 1971. During 1974, 1975 and 1976, Colby was employed as a traveling salesman by Fresco-Hudson Sales & Marketing,

Inc. ("Fresco"), and also was self-employed as a representative of Waldorf Bakers, Inc. ("Waldorf"). Throughout this period, Colby and his wife collected benefits in amounts determined with reference to reports of annual earnings prepared by Colby and submitted to the Social Security Administration ("SSA").

Colby's employment agreement with Fresco provided for a 50% commission on sales plus $40 per week toward expenses. Colby's actual expenses related to his Fresco job were approximately $120 per week, but he was not reimbursed for expenses beyond the $40 allowance. His commission rate of 50%, however, was somewhat higher than is usual in his line of work, apparently to defray these additional expenses.

Colby calculated his earnings for the SSA reports in the same manner as he arrived at his net income on income tax returns. In each case, he added the commissions he received from Fresco to his gross income from Waldorf and the $40 per

week expense money from Fresco, and then deducted all of his business expenses to arrive at net taxable income for income tax purposes and earnings for SSA report purposes.

This method of reporting was acceptable to the Internal Revenue Service, but not to the SSA, and in 1977 the latter agency notified Colby that he had been overpaid during the previous three years as a result of an error in his earnings reports involving excessive deductions from gross income. On October 10, 1977, Colby filled out an SSA overpayment recovery questionnaire in which he indicated that repayment would not constitute a hardship, although he did not admit that he had been overpaid. He later repudiated this response in a letter to the SSA Appeals Council, in which he explained that when he said repayment would not be a hardship he was referring only to the alleged overpayment for 1974 and that, in any case, his circumstances were materially altered by his subsequent loss of employment so that any restitution

now would constitute a hardship.

Colby pursued available administrative remedies to a final determination of the Secretary, and then brought the matter here for a review of the Secretary's holding.

The nature of the dispute

At issue in this case is the Secretary's interpretation of section 203(f)(5)(A) of the Act, 42 U.S.C. §403(f)(5)(A), which provides in relevant part: "An individual's earnings for a taxable year shall be (i) the sum of his wages for services rendered in such year and his net earnings from self-employment for such year...."[1]

SSA Regulations No. 4, applying this section, provides:

> Amounts paid specifically--either as advances or reimbursements--for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and

expense allowances are combined in a single payment.

20 C.F.R. §404.1026(a)(8).

Colby claims that his mechanical approach to expenses wage-earners may deduct in calculating their earnings is not authorized by the Act. He argues that the controlling factor in determining whether amounts paid are treated as wages or deductible expenses should be the employer's and employee's intent rather than whether expenses were specificially labeled as such by the employer.

The Secretary responds that the regulation in question is valid, and that his final determination is supported by substantial evidence and should be affirmed.

Determination

Because 20 C.F.R. §404.1026(a)(8), supra, provides the basis of the Secretary's finding that Colby was overpaid, the initial question to be determined is its validity. Colby contents that

the distinction made in the regulation between the self-employed, who are permitted to report only their net earnings to the SSA, and wage-earners, who must report all remuneration except amounts designated by their employers as allowances or reimbursements for expenses, is arbitrary and without basis in the statute. This argument is without merit.

The Act itself is the original source of the disparate treatment accorded wage-earners and self-employed. Section 203(f)(5)(A), supra, introduces the distinction and provides different means of calculating earnings depending upon in which category an individual falls. It is natural that the distinction is carried over to the regulation.

The line drawn in the regulation between allowances and reimbursements explicitly designated as such and all other remuneration coincides with the line separating payments to employees on which

an employer need not make F.I.C.A. contributions and those for which he must do so. An employer is unlikely to make F.I.C.A. payments when he is not required to do so, and therefore is quite likely to segregate all expense payments to employees. Thus, in the great majority of cases, wage-earners reporting their earnings in accord with the regulation will be entitled to deduct all amounts actually attributable to expenses.

Additional bases for distinguishing between employees and the self-employed in calculating their earnings under the Act may be found in the different practical results flowing from these two categories under the Act's general scheme. In the case of employed persons, for example, both the employee and his employer make equal F.I.C.A. contributions based upon gross wages throughout the employee's working life. The self-employed, in contrast, make only one F.I.C.A. contribution which is a substantially smaller percentage of earnings than the combined contributions

made on behalf of a wage-earner, and this contribution is based upon net rather than gross income. The regulation in question is consistent with this general scheme.

The regulation thus clearly has a rational basis in the Act. And although the regulation may work a hardship in Colby's specific case, by preventing him from deducting all amounts he claims were business expenses in reporting his earnings to the SSA, this individual hardship does not render the regulation invalid. As noted above, the regulation is reasonably calculated to allow wage-earners all deductions to which they are entitled, and is therefore free of any "invidious discrimination". This, together with its being consonant with the Act, is sufficient to validate the regulation. Mathews v. DeCastro, 429 U.S. 181, 185 (1976); Richardson v. Belcher, 404 U.S. 78 (1971).

The next question is whether the Secretary's determination is supported by substantial evidence in

the administrative record. There is no dispute that the only amounts Fresco paid to Colby during the years in question that were segregated from wages and denominated allowances for expenses were the weekly $40 payments described above. No reimbursements for expenses were made. The Secretary acknowledged the legitimacy of Colby's deduction of the $40 payments from his gross receipts. Therefore, the Secretary's finding of overpayments based on Colby's deductions of more than $40 per week from his Fesco Commissions is supported by substantial evidence, and must be affirmed. Gold v. Secretary of HEW, 463 F.2d 38, 41 (2d Cir. 1972); Flores v. Dept. of HEW, 465 F.Supp. 317 (S.D.N.Y. 1978) (Conner, J.); 42 U.S.C. §405 (g).

One final question remains. The Secretary required plaintiff to refund the overpayments, pursuant to section 204(a)(1) of the Act, 42 U.S.C. § 404 (a)(1). Plaintiff, claiming that he was without fault in mistakenly taking unwarranted

deductions in his SSA earnings reports, and that his present financial situation is such that requiring him to make restitution would be against equity and good conscience, argues that recovery of the overpayments should be waived, relying on section 204(b), 42 U.S.C. 404(b).[2]

For Colby to prevail on this point, he must prove, pursuant to section 204(b), both that he was faultless and that recovery would be inequitable. The SSA Appeals Council found that Colby was without fault as to the 1974 overpayment, but that because Colby had the resources to repay, recovery by the government of that overpayment would not violate principles of equity or good conscience. With respect to the 1975 and 1976 overpayments, the SSA found that Colby was not faultless because he had been notified of the error in his deduction computation method and that he was therefore not entitled to consideration of a waiver as to those years.

These findings are supported by substantial evidence. As noted above, Colby admitted in his overpayment questionnaire that repayment would not constitute a hardship; while he later repudiated this statement, his disclaimer went only to the 1975 and 1976 overpayments. Thus, despite additional evidence concerning Colby's changed circumstances, the Secretary's findings as to 1974 are supported by the record.

As to the question of fault with respect to the overpayments in 1975 and 1976, the SSA in its Reconsideration Determination found that the relevant rules regarding deductions were explained to plaintiff when he filed his 1975 and 1976 reports.[3] This conclusion is supported by Colby's own statement during the hearing below that "on one of my visits to the Social Security Office they said, oh, you're wrong, you can't do that," referring to Colby's practice of reporting his Waldorf earnings and deductions lumped together with those from Fresco.[4]

This evidence is clearly "more than a mere scintilla... [and such that] a reasonable mind might accept as adequate to support a conclusion," Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938), and is therefore sufficient to sustain the Secretary's finding. Richardson v. Perales, 402 U.S. 389, 401 (1971); 42 U.S.C. § 405(g).

Conclusion

For the reasons stated above, the Secretary's motion for judgment on the pleadings is granted, and Colby's complaint is dismissed. Plaintiff's motion for summary judgment is denied.

IT IS SO ORDERED.

Dated: New York, New York
January 17, 1980

ROBERT L. CARTER
U.S.D.J.

FOOTNOTES

1. "Wages" is defined at section 209, 42 U.S.C. § 409, as "remuneration...for employment, including the cash value of all remuneration paid in any medium other than cash..." Section 211(a), 42 U.S.C. §411(a), defines "net earnings from self-employment" as "the gross income... derived by an individual from any trade or business carried on by such individual, less the deductions allowed under [Chapter 1, Internal Revenue Code of 1939,] which are attributable to such trade or business..."

2. Section 204, 42 U.S.C. § 404, provides in relevant part:

> (a) Whenever the Secretary finds that more or less than the correct amount of payment has been made to a person under this subchapter, proper adjustment or recovery shall be made...
>
> * * * *
>
> (b) In any case in which more than the correct amount of payment has been made, there shall be no... recovery by the United States from any person who is without fault if such... recovery would defeat the purpose of this subchapter or would be against equity and good conscience.

3. Administrative Record, p. 57.

4. Transcript of Hearing, p. 18, Administrative Record, p. 39.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1108—September Term 1979

(Argued May 6, 1980 Decided May 23, 1980)

Docket No. 80-6056

JOHN COLBY,

Plaintiff-Appellant,

—against—

PATRICIA ROBERTS HARRIS, Secretary of Health, Education and Welfare,

Defendant-Appellee.

Before:

FRIENDLY, FEINBERG and TIMBERS,

Circuit Judges.

Appeal from order of the United States District Court for the Southern District of New York, Robert L. Carter, J., granting judgment on the pleadings to defendant-appellee Secretary of Health, Education and Welfare in an action challenging determination of the Secretary that plaintiff-appellant was overpaid $8,982.10 in retirement

insurance benefits for the years 1974 through 1976 and that recovery thereof may not be waived.

Affirmed.

JOHN COLBY, New York, N.Y., Plaintiff-Appellant, *pro se*.

ROBERT M. JUPITER, Assistant United States Attorney, New York, N.Y. (William M. Tendy, United States Attorney for the Southern District of New York, Michael H. Dolinger, Assistant United States Attorney, of Counsel), *for Defendant-Appellee*.

PER CURIAM:

Plaintiff John Colby appeals from an order of the United States District Court for the Southern District of New York, Robert L. Carter, granting judgment on the pleadings to defendant Secretary of Health, Education and Welfare. Appellant's complaint sought review of a final determination of the Secretary that appellant was overpaid $8,982.10 in retirement insurance benefits for the years 1974 through 1976 and that recovery of the overpayments may not be waived. For reasons indicated below, we affirm the judgment of the district court.

Appellant became entitled to Social Security benefits in 1971. During the years 1974 through 1976, appellant was employed as a traveling salesman by Fresco-Hudson Sales & Marketing, Inc. ("Fresco") and also was self-employed as

a representative of Waldorf Bakers, Inc.; Fresco paid appellant a fifty percent sales commission and $40.00 a week for expenses. Under the Social Security Act, ("the Act") deductions will be made from an individual's social security benefits if he earns more than a certain amount from wages or self-employment income. See 42 U.S.C. §§ 403(b) and (f). During the years 1974 through 1976, appellant and his wife continued to receive benefits, the amounts of which were determined on the basis of annual earnings reports submitted by appellant.

In 1977, however, the Social Security Administration determined that appellant had erroneously computed his net earnings for the three previous years. In calculating net earnings, appellant had deducted from his gross employment earnings all of his expenses in connection with his employment by Fresco; however, the Administration allows a wage earner to deduct as expenses only those amounts specifically identified by the employer as advances or reimbursements for expenses. See 20 C.F.R. § 404.1026(a)(8) ("the Regulation"), reprinted in the margin.[1] Since Fresco paid appellant only $40.00 a week for expenses, the Administration concluded that appellant could not deduct more than that amount as weekly expenses attributable to his employment with Fresco. Thus, the Administration recomputed appellant's earnings in the years involved; this increased his earnings well above the amounts he had previously reported, requiring

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1 20 C.F.R. § 404.1026(a)(8) provides:

> Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

a reduction in benefits. Accordingly, the Administration found that appellant and his wife had received overpayments of benefits in the amount of $8,982.10 as a result of excessive deductions for expenses. After the Secretary reached a final decision to the same effect, appellant sought review in the district court; he unsuccessfully argued there that the Regulation was unauthorized and had no rational basis in the Social Security Act and that, in any event, repayment here should be waived.

Appellant's principal argument before us, as it was before Judge Carter, is that the Regulation, in effect, unfairly distinguishes between those who are self-employed and those who earn wages as employees of others. The self-employed need report as "earnings" only net earnings, see 42 U.S.C. § 403(f)(5)(A), while the effect of the Regulation is that the wage earner must report as "earnings" all remuneration except amounts "paid specifically" as reimbursements or advances for expenses. Thus, in computing his earnings from his employer, Fresco, for Social Security purposes, appellant could not deduct expenses in excess of the $40.00 a week Fresco had earmarked as reimbursement for expenses. In contrast, if appellant had been solely self-employed, he could have deducted all of his expenses from his gross earnings.[2]

Judge Carter rejected appellant's argument that this disparate treatment required him to set aside the Regulation. We affirm the decision of the district court substantially for the reasons set forth in Judge Carter's opinion, reported at ____ F.Supp. ____ (S.D.N.Y. 1980). As that opinion points out, the difference in treatment between wage earners and the self-employed is consistent with the terms of 42 U.S.C. § 403(f)(5)(A), which distinguishes be-

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2 Appellant points out that the Internal Revenue Service has allowed him to deduct such expenses for income tax purposes.

tween earnings from wages and from self-employment. Moreover, although the Regulation appears to present a surface inequity, the basis for the distinction it draws becomes clearer when the Regulation is read in the context of other provisions of the Act. As Judge Carter noted, employers are not required to pay Federal Insurance Contribution Act (F.I.C.A.) taxes on payments designated as reimbursements for expenses; employers therefore have an obvious incentive not to fix such allowances at a figure lower than the facts warrant. Moreover, an equally situated employee and self-employed worker are treated differently under contribution and benefit provisions of the Act. The employee pays less F.I.C.A. tax and receives higher benefits than a self-employed worker. But the self-employed individual who continues to work while receiving benefits is entitled to deduct all business expenses in computing his earnings for purposes of determining whether his benefits are excessive. The Regulation thus equalizes to a certain extent the disadvantages to self-employed workers as a result of other provisions of the Act. Under the circumstances, we do not think Judge Carter erred in holding that the Regulation has a rational basis and is authorized. Lower court authority is apparently divided on this issue,[3] and the two appellate decisions cited to us—Thompson v. Weinberger, 548 F.2d 1122 (4th Cir. 1976) and Angell v. Flemming, 291 F.2d 72 (4th Cir. 1961)—do not lead us to a contrary result. In *Angell*, the Secretary sought to treat all of the employee's remuneration as "wages," even though the employer specifically identified a portion of the payments as reim-

3 Compare, e.g., Warren v. Ribicoff, C.C.H. Unemp. Ins. Rep. ¶ 10,262.310 (S.D. Iowa 1961); Dearing v. Flemming, C.C.H. Unemp. Ins. Rep. ¶ 10,262.310 (W.D. Va. 1959) with Sayer v. Richardson, 360 F. Supp. 199 (W.D. La. 1973); Joyner v. Ribicoff, 206 F. Supp. 874 (W.D. Va. 1962); Miller v. Ribicoff, 195 F. Supp. 534 (W.D.S.C. 1961).

bursements for expenses; in contrast, the Secretary here concedes that the $40.00 per week appellant received as reimbursement for his expenses was properly deductible. *Thompson* provides some support for our position: while reserving the question of the deductibility of expenses incurred by a "traveling salesman," the court held that the Regulation was reasonably related to the purpose of the enabling legislation. 548 F.2d at 1128-29.

We see no reason to discuss appellant's further argument concerning waiver of repayment, since Judge Carter's opinion adequately deals with that point.

The judgment of the district court is affirmed.

Supreme Court, U. S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-166

In the Supreme Court of the United States

OCTOBER TERM, 1979

JOHN COLBY, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Cases:

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Miller v. *Ribicoff*, 195 F. Supp. 534 4

Thompson v. *Weinberger*, 548 F. 2d 1122 4

Statutes and regulations:

Social Security Act, 42 U.S.C. 301 *et seq.* 1

Section 203(f)(5)(A), 42 U.S.C. 403(f)(5)(A) 3

Section 205(g), 42 U.S.C. 405(g) 2

20 C.F.R. 404.1026(a)(8) (1979) 1, 2

20 C.F.R. 404.1045 2

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 80-166

JOHN COLBY, PETITIONER

v.

PATRICIA R. HARRIS, SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioner contends that the Secretary's regulation governing the method by which earnings are calculated in determining whether Social Security benefits should be reduced (20 C.F.R. 404.1026(a)(8) (1979))[1] unfairly distinguishes between self-employed persons and wage earners and is thus unauthorized by the Social Security Act, 42 U.S.C. 301 *et seq.*

1. Petitioner brought suit in the United States District Court for the Southern District of New York under

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[1]20 C.F.R. 404.1026(a)(8) (1979) provided:

> Amounts paid specifically—either as advances or reimbursements—for traveling or other bona fide ordinary and necessary expenses incurred or reasonably expected to be incurred in the business of the employer are not wages. Traveling and other reimbursed expenses must be identified either by

Section 205(g) of the Social Security Act, 42 U.S.C. 405(g), to review a final determination of the Secretary of Health, Education, and Welfare ("the Secretary") that petitioner was overpaid $8,982.10 in retirement insurance benefits for the years 1974 through 1976 and that recovery thereof may not be waived (Pet. App. 4a). In those years, petitioner was employed as a traveling salesman and was paid $40 per week for expenses in addition to a commission (*id.* at 19a). Petitioner's true business expenses, however, exceeded the allowance, and in calculating his earnings for Social Security purposes he deducted his expenses in full as he would have been entitled to do had he been self-employed (*ibid.*).

Because petitioner was not self-employed, the Secretary, applying 20 C.F.R. 404.1026(a)(8) (1979), determined that petitioner's deductible business expenses were limited to the $40 per week identified by his employer. Accordingly, the Secretary disallowed so much of petitioner's claimed business deductions as exceeded that amount, recomputed his earnings and reduced his retirement benefits (Pet. App. 19a-20a). The district court granted the Secretary's motion for judgment on the pleadings, rejecting petitioner's contention that the

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making a separate payment or by specifically indicating the separate amounts where both wages and expense allowances are combined in a single payment.

This provision has been carried over in substantially the same form in 20 C.F.R. 404.1045:

> Amounts that your employer pays you specifically—either as advances or reimbursements—for traveling or for other ordinary and necessary expenses incurred, or reasonably expected to be incurred, in your employer's business are not wages. The employer must identify these travel and other expenses either by making a separate payment or by specifically stating the separate amounts if both wages and expense allowances are combined in a single payment.

challenged regulation is inconsistent with the Social Security Act (*id.* at 1a-16a). The court of appeals affirmed (*id.* at 17a-22a).

2. The decision below is correct and does not conflict with any decision of this Court or the courts of appeals.

a. The challenged regulation is a permissible exercise of administrative discretion in that it reasonably interprets Section 203(f)(5)(A) of the Act, 42 U.S.C. 403(f)(5)(A), which provides in pertinent part that "[a]n individual's earnings for a taxable year shall be (i) the sum of his *wages* for services rendered in such year and his *net* earnings from self-employment for such year * * * " (emphasis added). Moreover, the regulation's disparate treatment of wage earners and self-employed persons is consistent with the terms and purposes of the Act. As the court of appeals observed (Pet. App. 21a):

> [E]mployers are not required to pay Federal Insurance Contribution Act (F.I.C.A.) taxes on payments designated as reimbursements for expenses; employers therefore have an obvious incentive not to fix such allowances at a figure lower than the facts warrant. Moreover, an equally situated employee and self-employed worker are treated differently under contribution and benefit provisions of the Act. The employee pays less F.I.C.A. tax and receives higher benefits than a self-employed worker. But the self-employed individual who continues to work while receiving benefits is entitled to deduct all business expenses in computing his earnings for purposes of determining whether his benefits are excessive. The Regulation thus equalizes to a certain extent the disadvantages to self-employed workers as a result of other provisions of the Act.

b. The decision below is consistent with the decisions of other courts of appeals. In *Angell* v. *Flemming*, 291 F. 2d 72 (4th Cir. 1961), on which petitioner principally relies, the court of appeals reversed the Secretary's ruling that the employee's salary in its entirety constituted "wages" notwithstanding the employer's acknowledgment that the payments were in part a reimbursement for expenses. Here, the Secretary permitted the employee to deduct the $40 per week specifically identified by the employer as an expenses reimbursement. The other two cases cited by petitioner—*Harper* v. *Flemming*, 288 F. 2d 61 (4th Cir. 1961), and *Butler* v. *Flemming*, 288 F. 2d 591 (5th Cir. 1961)—are inapposite. At issue in *Harper* was the definition of "material participation" by the owner of a farm in the production and management of that farm for purposes of determining old age benefits under the Act. In *Butler*, the issue was whether the claimant was totally disabled within the meaning of the disability freeze provisions of the Act.[2]

On the other hand, *Thompson* v. *Weinberger*, 548 F. 2d 1122 (4th Cir. 1976), which petitioner seeks to minimize, provides substantial support for the decision below. In that case the court of appeals considered whether a salaried city council member receiving Social Security retirement benefits was entitled to exclude office and secretarial expenses from his gross income in determining excess earnings under the Act. The councilman sought to exclude those expenses even though the city had not identified any part of his $400 per month salary as reimbursement. While the Fourth Circuit declined to express an opinion on the question of deductibility of

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[2]The passage that petitioner attributes (Pet. 5) to the Fifth Circuit in *Butler* is, in actuality, a quotation from *Miller* v. *Ribicoff*, 195 F. Supp. 534, 535 (W.D.S.C. 1961).

expenses for traveling salesmen, it upheld the regulation challenged herein as being reasonably related to the purposes of the Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09